Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ROBBYN BROWN,

Petitioner

v.

JOHN H. SNOW, et al,

Respondents

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals For The Seventh Circuit.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the District Court's refusal to enforce its own Protective Order constitutes an abuse of discretion? If so, then whether the trial court misapplied the law when it granted summary judgment and/or judgment as a matter of law based upon that lack of evidence (i.e. evidence that had been requested, but never provided)?

2. Whether a performance appraisal that is theoretically based upon objective criteria is accorded a presumption of correction, and therefore unchallengeable under 42 U.S.C. § 2000e-2(m) and §107 of the Civil Rights Act of 1991?

3. Whether employment information sought supporting alleged discriminatory performance appraisals is subject to review via discovery? If so, then whether IRS's refusal to provide said information should have been subject to a Rule 37 sanction, a missing evidence inference, and/or the redress provided for in 29 C.F.R. § 1614.108?

4. Whether the trial court misapplied the law when it refused to consider all reasonable inferences in my favor, when it granted summary judgment or judgment as a matter of law?

5. Whether the trial court's refusal to allow me to pursue my hostile working environment claim misapplied the law?

6. Whether the IRS was free to orally disclose under the Privacy Act, (5 U.S.C. § 552a(b)), any information about my work performance, EEO complaints filed, or other employment-related records once contained in its system of records after it had purportedly physically removed from those records from its system of records?

7. Whether a defendant's deliberate refusal or avoidance of delivery of the Waiver of Summons sent via certified mail rises to the "rare" level of "good cause" that is required to be shown under the Advisory Committee Notes of Rule 4(d) of the Federal Rules of Civil Procedure?

8. Whether the Waiver of Summons mailed postage paid first-class is presumed delivered under Rule 4(d) of the Federal Rules of Civil Procedure in conjunction with United States v. Chem. Found., Inc., 272 U.S. 1, 14-15?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the Seventh Circuit were:

ROBBYN BROWN, appellant;
JOHN H. SNOW, appellee;
DORIAN MORLEY, appellee;
DELORIS FEATHERSTONE, appellee.
KATHLEEN SWAIN, appellee

CORPORATE DISCLOSURE STATEMENT

No corporate disclosure statement is required in that there are no nongovernmental corporate parties in this matter.

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OPINIONS AND ORDERS BELOW

The opinion and order of the Seventh Circuit is unreported and is reproduced in the Appendix.

The opinion and orders of the United States District Court for the Southern District of Illinois that are at issue are reproduced in the Appendix.

JURISDICTION OF THIS COURT

The judgment of the Seventh Circuit was entered on April 06, 2004. This Court has jurisdiction to review the judgment of the Seventh Circuit under *28 U.S.C. § 1254(1).*

STATUTORY PROVISIONS INVOLVED

5 U.S.C. § 552a(b)(1) (Privacy Act) states that:

No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be--

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

42 U.S.C. § 2000e-2(a) states that:

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

An "unlawful employment practice is defined in the same statute. Under *42 U.S.C. § 2000e-2(m)*:

Except as otherwise provided in this title [*42 USCS § § 2000e* et seq.], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-3(a) states that:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any

individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

29 C.F.R. 1614.108(c) states that:

The procedures in paragraphs (c)(1) through (3) of this section apply to the investigation of complaints:
(1) The complainant, the agency, and any employee of a Federal agency shall produce such documentary and testimonial evidence as the investigator deems necessary.
(2) Investigators are authorized to administer oaths. Statements of witnesses shall be made under oath or affirmation or, alternatively, by written statement under penalty of perjury.
(3) When the complainant, or the agency against which a complaint is filed, or its employees fail without good cause shown to respond fully and in timely fashion to requests for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the investigator may note in the investigative record that the decisionmaker should, or the Commission on appeal may, in appropriate circumstances:
(i) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;
(ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;
(iii) Exclude other evidence offered by the party failing to produce the requested information or witness;
(iv) Issue a decision fully or partially in favor of the

opposing party; or
(v) Take such other actions as it deems appropriate.

STATEMENT OF THE CASE

The crux of this case is four-fold:
(1) Whether race or sex was a motivating factor in any employment practice, namely performance appraisals, and the promotions that were based upon them;
(2) Whether the IRS retaliated against me after I filed my initial complaint;
(3) Whether the IRS created a hostile working environment; and
(4) Whether the IRS violated the Privacy Act when it made disclosures about my work performance and me to my coworkers?
(5) Further, to what extent must the IRS comply with the EEOC regulations, 29 C.F.R. § 1614 regarding time limitations for processing cases and whether the remedies for violating those mandates are available at trial?

In December 1994, while working under Richard Knowles (Mr. Knowles), I was assigned to Grand Jury to replace a white male revenue agent who had recently been promoted to a GS-13 position. The investigation was a highly publicized case that resulted in criminal convictions. Upon the conclusion of the Grand Jury assignment and after I had prepared the Stipulation Plea Agreements, I was reassigned to Kathleen Swain's Examination Group 1708.

Ms. Swain subsequently informed me that Mr. Knowles had assigned all the cases that were related to this

Grand Jury investigation (whether prosecuted or not) to Timothy Neighbors, a white male for the civil examination. According to Ms. Swain, Mr. Neighbors made civil fraud referrals on these cases prior to making contact with those taxpayers or their representatives for the sole purpose of generating fraud statistics. I demonstrated at trial that Neighbors had a conflict with these returns and that Mr. Knowles should not have assigned those returns to him. (Trial Exhibit 8 in conjunction with Examination Division Chief Patricia Leatherwood's testimony) (See Appendix pp. 113A-118A; 155A). Upon Neighbor's selection for the GS-13 position, those returns were immediately reassigned primarily to GS-11 female revenue agents, who did not receive commendatory memorandums for their work, nor did they receive higher-graded duty pay (Knowles trial testimony - See Appendix p.118A).

According to the Catherine Gilmore's (now known as Catherine Murphy) affidavits and trial testimony, in some of those referrals made by Mr. Neighbors, the taxpayers actually reported the income at issue, thereby negating the necessity of the premature referrals. In the IRS, fraud referrals are looked upon very favorably (Appendix p. 119A). I also demonstrated at trial that Mr. Knowles had a history of assigning better returns to Mr. Neighbors (Appendix pp. 138A-145A). Given the foregoing, it is my contention Mr. Knowles assigned those returns stemming from my Grand Jury assignment to Mr. Neighbors with the intent to place him in a more favorable competitive position over me and to pump up his evaluation.

While employed under Mr. Knowles, he shared with me negative information about other females or minorities employed by the IRS. The discussions about the female agents consisted primarily of whom they slept with in being promoted. One discussion about a black male revenue agent

centered on his competence. He also made comments on more than one occasion as to my per capita income exceeding his.

After filing my initial complaint, my supervisor at the time Kathleen Swain provided me a negative performance evaluation that she and her supervisor, Deloris Featherstone had prepared. She told me that I was an intelligent person and could figure it out. Thereafter, I was subjected to increased work scrutiny, including multiple case file reviews and workload reviews. Ms. Swain didn't stop there. She then began a campaign of providing false and negative information about me professionally and my work performance to my coworkers in an attempt to ostracize me. This culminated in a hostile work environment (Appendix pp. 69A-74A; 76A-90A; and 91A-95A).

During the administrative processing of my complaint, I repeatedly requested the agency secure the information before it was destroyed. My requests were ignored.

Discovery Abuses and Evidence Exclusions:

The required de novo review of the summary judgment and judgment as a matter of law orders cannot possibly be accomplished without first reviewing the abuses that took place during the administrative and discovery phases, and the evidentiary exclusions made at trial. If these abuses and exclusions denied me the opportunity to fully and fairly litigate my case based upon its merits, then my constitutional right to due process has been denied.

The panel decision states I presented "nothing to convince them" the court abused its discretion with respect to

discovery (Appendix pp. 1-7A at p.7A). I respectfully remind the court that I am a pro se appellant without legal assistance and the Supreme Court has held that pro se briefs and pleadings are not to be held to the same legal standards as those of trained attorneys (Estelle v. Gamble, 429 U.S. 97, 106 (1976)). However at pages 27-29 of Appellant's Brief, I stated (with citations to the record) that I was a visibly pregnant pro se plaintiff who was given what amounted to a 2-month discovery period after I returned from maternity leave and was denied records highly relevant to my case (Appendix 24A-38A). The court granted a Protective Order to facilitate the release of the records (Appendix 11A-13A). Mr. Llewellyn continued to refuse to provide them. I petitioned the court to enforce its Protective Order (Appendix 14A-21A). The Court did not (Appendix pp. 22-23). Further, Mr. Llewellyn refused to allow me to depose defendants, Kathleen Swain and Delores Featherstone. Had I had that opportunity, I could have followed up on Swain's removal as the Taxpayer Advocate for similar EEO violations (Trial Day 5, pp. 120-121) and Swain's affidavit that Richard Knowles had said that she slept with her supervisor in order to get her promotion (Trial Day 3, pp. 113-126; Trial Day 4, pp. 3-17).

The Court also refused to allow into evidence, undisputed statements Knowles made to me about other females in the office who he alleges slept around in getting their promotions, any evidence of the hostile work environment cultivated by Swain including her unauthorized disclosures in violation of the Privacy Act (Appendix pp. 69A-90A; 91A-95A), and statements Swain made to me that Neighbors had not worked any complex corporate returns. The hostile work environment (Transcript 01/31/03, pp. 60-63), increased work scrutiny, and Privacy Act violations were other wrongs or acts that are admissible under Rule 404(b) of the F.R.E. Swain's statements to me regarding Neighbors'

lack of complex corporate return work was admissible under Rule 801(d)(2) of the F.R.E.

The trial court's decision to grant summary judgment and judgment as a matter of law (Appendix pp. 46A-68A), predicated to a large degree upon the lack of evidence, (evidence which I requested, was entitled to under Discovery and the subsequent Protective Order, but was never provided) was an abuse of discretion. Before issuing a directed verdict, the court is required to consider "all available inferences" in favor of the nonmoving party. (See Anderson, supra). This is not discretionary, but rather a mandate from the Supreme Court. Without considering the adverse inferences of the missing evidence doctrine, and 29 C.F.R. § 1614.108, the court misapplied the law. Further, it rewarded the IRS and its counsel for its contempt and abuse of the administrative and discovery processes, did not level the evidentiary playing field, denied me due process and the right to a trial by jury.

Despite the Court not enforcing its Protective Order, I demonstrated at trial: (1) the criteria for the position in the failure to promote decisions (Trial Ex. 58), (2) the IRS maintained documents / systems that would have objectively established whether employees had met that criteria for the position (Transcript Day 1, pgs 76-89; Trial Exh. 5-8) (Appendix pp. 131A; 145A-146A – Transcript p. 99, lines 1-18); (3) undisputed evidence that I met those criteria (Transcript Day 1, pages 64-70, Defendant's Answer, Docket Doc. 13, page 8, ¶ 25, Trial Exhibits 63,65 and 72); (4) I was the only GS-12 in the downstate area who did not have a temporary GS13 promotion that had been transferred into LMSB (Transcript Day 1, pp. 78-79, Day 3, pp. 46-51) (Appendix pp. 120A-130A); (5) the IRS used the streamlined approach for evaluating the promotion package such that only the performance appraisals and awards were considered (Trial Exh. 4 & 28, pg. 5, Sect. K); (6) I was the only minority and the only female out of the four candidates that made the best

qualified list, and the only candidate that the IRS violated the streamlined approach with when it lowered only my numbers; (Trial Exh. 4); (7) as in Reeves, the de facto decisionmakers in the failure to promote counts were actually Featherstone in conjunction with Knowles and Swain; (Trial Day 4, pp. 170-172; 202-206); (8) retaliatory animus displayed by Swain and Featherstone including increased work scrutiny (Trial Ex. 15-19) and attempts to lower my evaluation (Trial Ex. 26, 29-30, 32-33; (8) the unlawful discriminatory practices that went in to Neighbors performance appraisals (i.e. race or sex being motivating factors), which subsequently formed the basis for his selection; and (9) as in Reeves, a jury issue as to the falsity of the IRS's explanation.

After having refused to provide the supporting information for the challenged performance appraisals, the IRS rests its case solely on the fact that Knowles provided Neighbors a more favorable appraisal. However, the unambiguous language of 42 U.S.C. § 2000e-2(m) provides no presumption of correction for that appraisal. To hold otherwise, discriminatory employers need only provide the least qualified candidate with an exceptional performance appraisal to hide or shield their unlawful employment practices, waltz into court with it, and that would be the end of the case. The performance appraisal then becomes for employment matters what the "poll tax" was for voting matters.

The panel decision states that Neighbors performed the job of the GS-13. That is a disputed question of fact that is reserved for the jury not the judge. The record reflects the IRS refused to provide any evidence that Neighbors actually performed the job. It is undisputed that he occupied the position.

If Neighbors had done the work of the job, and performed well, why would the IRS not have released that

information during the administrative processing of this case and during discovery? Why did the IRS's co-counsel Dee Jarrett Dow continue to argue before the EEOC over an 18-month period that Featherstone never told the EEO Counselor she had knowledge of my initial complaint at the time it was filed (Appendix pp. 99A-107A)? Didn't Dow as an officer of the court have a responsibility to ask Featherstone and then to inform the EEOC that the IRS's initial assertions were incorrect (Appendix pp. 108A-112A)? Why would they have subsequently destroyed that information when they knew it was the subject of a lawsuit? Why would Knowles have evaluated Neighbors, per Knowles own admission, as a GS 12 rather than the GS 13 position he was currently occupying (Transcript Day 4 pp. 121-123) (Appendix pp. 148A-150A)?

If Knowles were not assigning white males more favorable assignments, why would the IRS have refused to provide the computer data that would have attested to this? Why would they have subsequently destroyed this information when they knew it was the subject of a lawsuit? Why would Knowles have assigned Neighbors those fraud related returns with the tax already determined when Knowles knew Neighbors had a potential conflict of interest (Trial Ex. 8)? Why would Knowles have assigned those same returns to GS-11 female agents after Neighbors had received the commendatory memos and the promotion? Why did Knowles not recommend the females agents for commendatory memos or awards for working these same type of cases (Trial Day 4, pp. 34-38)? Further the court overlooked the testimony (Trial Day 3, pp. 76-79) (Appendix pp. 156A-159A) and affidavit (Docket Doc. 91, Ex. H) of Catherine Gilmore (Murphy) and the affidavit of Yolanda Carothers-Tharpe, (Docket Doc. 91, Exhibit G) a former IRS group manager, that Neighbors had been assigned more productive returns (Appendix pp. 160A-161A).

Summary Judgment & Judgment as a Matter of Law

The panel decision states, "although the district court framed its conclusion in terms of whether Brown made out a prima facie case, on review we need only ask whether the evidence reasonably supports Brown's claims". The district court actually told me I had not set out a prima facie case (Appendix pp. 8A-10A). The panel decision implicitly recognizing this as having been in error, however, is inconsistent with the standard set out in Reeves v. Sanderson, 530 U.S. 133, 150 and Anderson v. Liberty Lobby, Inc., 477 at pages 250-251. In Anderson, supra, the Supreme Court stated the standard for a directed verdict under Federal Rule of Civil Procedure 50(a) is as follows:
"...the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. Brady v. Southern R. Co., 320 U.S. 476, 479-480 (1943). If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed. Wilkerson v. McCarthy, 336 U.S. 53, 62 (1949)."

Further in determining whether a genuine issue of material fact exists, courts must construe all facts in the light most favorable to the non-moving party, draw all reasonable and justifiable inferences in favor of that party, not make credibility determinations or weigh the evidence which are functions of the jury and not the judge, (Anderson, at 255) and must disregard evidence that would appear to be favorable to the moving party that the jury would not have been required to believe (Reeves, at 151).

> "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case,

suffice to show intentional discrimination" (Reeves, at 147).

Having presented the elements of my prima facie case, I demonstrated at trial uncontroverted and undisputed evidence that I worked the type of returns required for the GS-13 position. I also demonstrated at trial the increased work scrutiny I was subjected to after filing my initial complaint, negative performance evaluations that Swain began to issue after I filed the complaint, both Swain and Featherstone's having falsely stated initially they had no knowledge of my initial complaint (Appendix 108A-112A), and a document they submitted after I filed my complaint stating I was failing in my job (Trial Exhibit 33) despite the IRS previous answer that at all relevant times I had met or exceeded their expectations.

Civil Rights Act of 1991 and 42 U.S.C. 2000e-2(m):

The panel decision states that "However, absent any showing that those assignments were motivated by racial preference or animus, *see McPhaul,* 226 F.3d at 565, this conclusory assertion is not enough to overcome judgment as a matter of law".

This standard is suggestive of a heightened direct evidence requirement that conflicts with the clear statutory language of the Civil Rights Act of 1991 as codified at 42 U.S.C. 2000e-2(m) and with the unanimous Supreme Court decision in Desert Palace Inc., dba Caesars Palace Hotel v. Costa, 539 U.S. 90.

42 USC 2000e-2(m) states:
"Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color,

religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

Therefore the standard is not whether those assignments were motivated by race or sex, but whether race or sex were motivating factors in any employment practice, even though other factors may have motivated the decisions. Neither the trial court nor the panel decision addressed the retaliation claim with respect to the 1998 promotion and the hostile working environment claims, which were part of my initial complaint (Appendix 96A-98A) and which I continue to raise on appeal.

The Supreme Court in Desert Palace Inc., 539 U.S. 90, relying upon its decision in Connecticut Nat. Bank, at pages 253-254 (i.e. where the words of the statute are unambiguous, the "judicial inquiry is complete), rejected the direct evidence standard as conflicting with the clear statutory language of the 42 U.S.C. § 2000e . The Court held that under *§ 2000e-2(m)*, a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that "race, color, religion, sex, or national origin was a motivating factor for any employment practice." Id at 95-96.

Based upon the unambiguous language of the statute, a performance appraisal clearly being an employment practice is actionable if race or sex is a motivating factor in it contents. Having demonstrated at trial that Knowles steered more productive returns to Neighbors while not doing the same for minorities or the females in the group (Trial Day 4 pp. 90-115) (Appendix pp. 138A-a46A), steered the civil fraud referrals on cases that I worked to Neighbors despite Neighbors having a conflict of interest (Appendix p.117A), and then Neighbors having received several commendatory

memos from that work (Appendix 115A–116A –Transcript p. 32, lines 4-10), all of which factored into his evaluation, this created genuine issues of fact for the jury to decide.

Privacy Act:

Applying the plain language doctrine of Connecticut Nat. Bank, supra, the Privacy Act states that a disclosure by "any means of communication" is a violation. Overlooking Swain's unauthorized oral disclosures, the trial court as well as the panel decision confined its review and discussion to what Pagan or Hudgins may or may not have seen. The undisputed fact that Swain orally discussed my work performance or any employment matters concerning me with either Pagan or Hudgins clearly violates the Privacy Act (Docket Doc. 91, Exhibits P, Deposition of Cheryl Pagan, pp. 14-37 (Appendix pp. 69A-90A) and Exhibit Q, Deposition of Karen Hudgins, pp. 14-15, 38, lines 19-25) (Appendix pp. 91A-95A).

The panel decision is silent with respect to the hostile working environment claim (Appendix pp. 1A-7A) and therefore overlooks the standards set out in National Railroad Passenger Corporation v. Morgan, 536 U.S. 101; 122 S. Ct. 2061, Harris v. Forklift, 510 U.S. 17 and Merritor Sav. Bank, FSB v. Vinson, 477 U.S. 57. There's no question that I perceived it as hostile and so did my coworkers Pagan and Hudgins per their depositions referred to above. The 7th Circuit held in Knox v. Indiana, 93 F 3d 1327, 1334 that retaliating against a complainant by permitting her fellow employees to punish her violates Title VII. Further the panel decision summarizes the retaliation issues without applying the standards set out in National Railroad Passenger Corporation v. Morgan, 536 U.S. 101. Not having been allowed to pursue this cogent claim that was set out in my initial complaint, due process has been denied.

Waiver of Summons

In response to my complaint, Defendants suggested I had not properly served Defendants Swain, Featherstone, and Morley. In response, I sent a Waiver of Summons form supplied by the Court to each of them via certified mail. Concerned that Swain would not claim the certified letter, I also sent Swain the same "Waiver" postage paid by regular mail to the same address. The waiver sent by regular mail was never returned (Docs. 35 and 41). AUSA Llewellyn never addressed the waiver sent by regular mail.

Featherstone and Morley returned their waivers. Swain did not. The Post Office sent several notices to Swain to pick up the certified letter. I then formally served Swain and requested reimbursement of the costs for service of the summons. In their response, Swain through her Counsel AUSA Nicholas Llewellyn falsely stated Swain resided in Missouri and not Illinois (Doc. 37, para. 1). Upon being presented with evidence refuting this, Swain through Llewellyn recanted (Appendix 39A-43A). Given Swain and Llewellyn false statements to the Court and Swain's intentionally ignoring the certified mail, costs incurred in effecting service should have been imposed upon her per Fed.R.Civ.P.4. (See Appendix pp. 44A-45A).

Trial Court's Jurisdiction:

Jurisdiction was vested in the United States District Court for the Southern District of Illinois under Title VII of the Civil Rights Act of 1964, (42 USC§ 2000e et seq.); The Civil Rights Act of 1991, (42 USC § 1981a); The Privacy

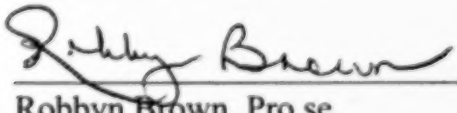
Act (5 USC § 552a); The Freedom of Information Act (5 USC 552); and 28 USC §§1331 and 1343.

REASONS FOR GRANTING THE WRIT

Because the judicial proceedings during the discovery phase departed far from the accepted and usual course of proceedings and the panel decision by the 7th Circuit sanctioned such a departure, the exercise of the Supreme Court's supervisory power is needed to protect my constitutional right to due process.

Further, certiorari should be granted to restore the plain textual meaning of the Privacy Act and Civil Rights Act of 1991 statutes and to remove the conflicts the 7th Circuit has taken with the cited relevant decisions of the Supreme Court.

Respectfully submitted,



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